Office - Supreme Court, U.S.
FILED
AUG 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2302

IN THE

Supreme Court of the United States

October Term 1982

ANTHONY I. GIACOBBE,

Appellant,

- against -

CARL ANDREWS, PEDRO S. CORDERO and BENJAMIN TENZER,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Marjorie Weinberg Rooney and
Ronald J. Mazzucco
Attorneys for Appellant
ANTHONY I. GIACOBBE
675 Forest Avenue
Staten Island, New York 10310
(212) 271-6900

(12719)

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Argument 2

Conclusion 10

TABLE OF AUTHORITIES

PAGE

Abate v. Mundt, 403 U.S. 182 (1971). 4
Blaikie v. Wagner, 258 F. Supp. 364 (S.D.N.Y. 1965) 3
Dusch v. Davis, 387 U.S. 112 (1967). 7
Hechinger v. Martin, 411 F. Supp. 650 (DDC 1976) 7
Reynolds v. Sims, 377 U.S. 533 (1964) 4
Sailors v. Board of Education of the County of Kent, 387 U.S. 105 (1967) 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982
No. 81-2302

ANTHONY I. GIACOBBE,

Appellant,

- against -

CARL ANDREWS, PEDRO S. CORDERO and BENJAMIN TENZER,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Appellant Anthony I. Giacobbe submits this brief in opposition to appellees' motion pursuant to Supreme Court Rule 16 (1)(c) for an order summarily affirming the judgment appealed and in further support of appellant's application that this Court note probable jurisdiction and schedule this appeal for plenary briefing

and argument.

A full statement of the case and the question presented for review are contained in the initial Jurisdictional Statement, to which the Court is respectfully referred.

ARGUMENT

This appeal presents the question of whether the "one person, one vote" principle must, as respondents would have it, be applied in a wooden fashion, shackled to a simplistic "quantitative analysis", or whether, to use the words of the District Court during oral argument, "there are limits even upon orthodoxy, and that the essential criteria are reason and common sense." (A. 90)

The difference between these two approaches is exemplified by the two lower court opinions that have considered the constitutionality of New York City's at large councilmanic seats, reaching oppo-

site results. In the first case, Blaikie v. Wagner, 258 F. Supp. 364 (S.D.N.Y. 1965), the three-judge District Court undertook a meticulous and searching analysis of the unique challenges and requirements of New York City's unicameral legislative body, which was comprised then, as it is now, of at large and district seats. The Blaikie court unanimously concluded that the "minimal" voting disparity introduced by Staten Island's "extra" at large seat was constitutionally justified by the goal of affording "at least the possibility of representation" to the City's minority party voters. 258 F. Supp. at 369, 370.

In the case at bar, however, the District Court, despite its misgivings (see p. 2, supra), felt itself "constrained" to eschew any analysis whatsoever of the merits of the at large system, and struck it down on a purely mathematical

basis.*

Respondents argue in their Motion to Affirm that the reasoned analysis of the Blaikie court has been rendered obsolete by subsequent "refinements" in this Court's "one person, one vote" decisions since Reynolds v. Sims, 377 U.S. 533 (1964), and that the District Court's approach in this case was mandated by "modern Supreme Court learning." Indeed, as respondents read this Court's opinions, the services of a federal judge were hardly required to invalidate New York City's delicately balanced legislative system -- the job could have been done by a clerk with a pocket calculator.

Initially, it must be noted that the appellees point out that the percentage deviation from population equality as determined by the District Court was the result of the application of Abate v.

*The Second Circuit affirmed on the opinion below the day after oral argument, and thus offered no new analysis of its own.

Mundt, 403 U.S. 182 (1971). Appellant contends, under the facts of this case, that it was error for the District Court to apply the formula in Abate for determining percentage deviation.

The Abate formula involves the division of the total population of an area by the number of legislators, resulting in a numerically ideal representation per legislator. The resulting figure is then compared with the actual representation for each legislator to determine the extent of over and under representation.

The facts in Abate are inapposite to the facts of the instant case. In Abate, the legislative body was composed solely of district representatives and each legislator represented a separate, distinct, and different constituency. In the instant case, the New York City Council is composed of district and at large representatives and the Council Members at Large represent the same constituents as do the

District Council Members.

Council Member Giacobbe, for example, representing the entire Borough of Staten Island, represents the same people represented by the 1.8 District Council Members for Staten Island. Each of the Council Members at Large from Brooklyn represents the same constituents as do the total number of District Council Members representing the Borough of Brooklyn. The same is true with respect to the constituents of the at large members from the remaining three boroughs. It is clear that the application of Abate presupposes that each legislator represents a separate and different constituency. Because that is not the case with respect to each member of the New York City Council, it was error for the District Court to apply Abate to arrive at what is obviously an exaggerated and misleading figure of percentage deviation.

Moreover, appellant does not believe

that this Court has so utterly abandoned the use of "reason and common sense" in its approach to difficult apportionment problems. This Court's decisions in such cases as Dusch v. Davis, 387 U.S. 112 (1967) and Sailors v. Board of Education of the County of Kent, 387 U.S. 105 (1967) emphasize the need for innovation and flexibility in resolving the complex problems of urban government. Moreover, in Hechinger v. Martin, 411 F. Supp. 650 (DDC 1976), this Court recognized that the goal of facilitating some representation of political minorities in city government -- the same goal served so successfully by New York City's at large system -- may justify a minimal infringement of another protected constitutional right.*

The fact that the Democratic Mayor of

*In Hechinger, the right interfered with by Washington D.C.'s at large system was the First Amendment right to free political association -- certainly a right every bit as worthy of protection as the equal protection right claimed by respondents here.

New York City and the Democratically-controlled City Council have given up the fight for the preservation of the at large seats is hardly surprising. Nor is it conclusive of the merits of this appeal. The very purpose of the at large system is to challenge the Democratic Party's monopoly grip on the reins of political power in New York City. The right which Mr. Giacobbe seeks to vindicate here does not belong to the government but to the voters -- specifically the minority party voters who elected him to office and who have been disenfranchised by the abolition of the at large seats.

New York City government is not a problem which can be solved on a computer. The at large system, a feature of New York City government for eighteen years, was the product of the practical and innovative thinking of two distinguished commissions, and received the overwhelming

endorsement of the voters at a public referendum. Appellant respectfully submits that the same considerations which led the Blaikie court to uphold the constitutionality of the at large seats in 1965 remain valid and compelling today, and that the subsequent decisions of this Court do not close the door to such a realistic appraisal of the legitimate requirements of fair government in New York City.

If, on the other hand, respondents are correct in their interpretation of this Court's post-Blaikie decisions, then this appeal, which concerns the government of the nation's largest City, presents an appropriate occasion for a critical reassessment of this vital area of constitutional doctrine.

In either case, this appeal presents a substantial federal question entitled to plenary consideration by this Court.

Conclusion

For the reasons stated above, respondents' motion should be denied.

Respectfully submitted,

Marjorie Weinberg Rooney
Ronald J. Mazzucco
Counsel for Appellant
675 Forest Avenue
Staten Island, New York 10310
(212) 273-1400